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**Before the
Federal Communications Commission
Washington, D.C. 20554**

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 95-167
Table of Allotments,) RM-8699
FM Broadcast Stations.)
(Claremore and Chelsea, Oklahoma))

To: The Chief, Allocations Branch

Opposition to Petition for Partial Reconsideration

Michael P. Stephens ("Stephens"), by his attorney, hereby respectfully submits his Opposition to the Petition for Partial Reconsideration filed by Brite-Star Broadcasting ("Brite-Star") on May 5, 1997. In support thereof, the following is shown:

Michael P. Stephens is the permittee of KTFR (FM), Claremore, Oklahoma. On July 6, 1995, Michael P. Stephens filed a Petition for Rulemaking seeking to move the KTFR (FM) allotment from Claremore to Chelsea, Oklahoma. On November 2, 1995, the Federal Communications Commission issued a Notice of Proposed Rulemaking seeking comments on Stephens' proposal. On December 7, 1995, Stephens timely filed comments in support of the proposed allotment of Channel 264A to Chelsea, Oklahoma. Neither Brite-Star nor any other party filed comments. On January 6, 1996, Stephens filed reply comments in support of the proposed allotment. Again, neither Brite-Star nor any other party filed reply comments.

On March 28, 1997, the Federal Communications Commission issued a Report and Order in MM Docket 95-167 (DA 97-582) authorizing, inter alia, the change in

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KTFR (FM)'s community of license from Claremore, Oklahoma to Chelsea, Oklahoma (see Attachment A). On April 4, 1997, Stephens filed an FCC Form 301 application (i.e., along with the requisite FCC Form 301 filing fee of \$690.00 and the rulemaking fee of \$1,905.00) seeking to implement the changes authorized in the Commission's March 28, 1997 Report and Order.

Brite-Star's Petition for Partial Reconsideration is at its very essence a collateral attack on the FCC's decision to extend the underlying construction permit for KTFR (FM) (see FCC Correspondence 1800B3-BCD, released February 20, 1997). Enclosed herewith as Attachment B is a copy of the "Opposition to Application for Review" filed by Stephens on April 10, 1997 which addresses in depth Brite-Star's arguments pertaining to the FCC's grant of Stephens' FCC Form 307 extension application (i.e., FCC File No. BMPH-960205JZ). As may be noted therein, Brite-Star's claims fail for a number of procedural and substantive reasons (e.g., lack of standing, failure to satisfy the requirements of Section 1.115(b)(1) of the Commission's rules and regulations, etc.).

The apparent motivation behind the filing of Brite-Star's subject Petition for Partial Reconsideration is to hinder Stephens' continuing efforts to establish a new FM service in the Chelsea/Claremore, Oklahoma area.¹ Brite-Star has demonstrated no public interest rationale for "holding in abeyance" selected portions of the Report and Order. Similarly, Brite-Star has demonstrated no legal justification or precedent for such an approach. The simple fact is that Stephens is the holder of a valid construction

¹ Brite-Star has similarly filed an "Informal Objection" to Stephens' FCC Form 301 application which was filed on April 4, 1997 (i.e., seeking to implement the changes authorized in the Report and Order).

permit for Claremore, Oklahoma and the Allocations Branch was well within its statutory authority to issue the Report and Order modifying said construction permit. If, for some unforeseen reason, the FCC does ultimately rule in the future (after all appeals are exhausted) that the underlying KTFR (FM) construction permit should be canceled, then by operation of law the changes authorized in the FCC's Report and Order would similarly be forfeited. The remedy proposed in Brite-Star's Petition for Partial Reconsideration will only result in unjustified delay and will not have any effect whatsoever on the underlying issue of the validity of the KTFR (FM) construction permit.

Finally, Brite-Star's Petition for Partial Reconsideration is in effect an attempt to have the FCC reconsider Brite-Star's late-filed rulemaking comments in the above-referenced Claremore/Chelsea, Oklahoma rulemaking. Such a back-door petition for reconsideration is not contemplated by the FCC's rules and is yet another basis for denying the subject Petition for Partial Reconsideration.

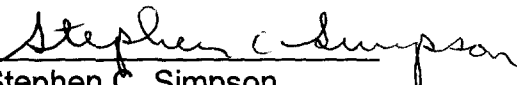
In summation, the subject rulemaking proceeding is an improper venue for adjudication of any issues surrounding the validity of the KTFR (FM) construction permit. Brite-Star has filed an Application for Review with respect to the Commission's February 20, 1997 grant of Stephens' FCC Form 307 application. Therein lies the proper venue. Brite-Star has made no factual or legal showing whatsoever that the FCC acted improperly in issuing its March 28, 1997 Report and Order granting Stephens' Petition for Rulemaking. That being the case, there is no staff action which is properly before the Commission for reconsideration as it pertains to the Claremore/Chelsea, Oklahoma rulemaking (Brite-Star's thinly-veiled attempt to have the FCC consider Brite-Star's late-filed rulemaking comments is certainly no basis and in

fact is fatally flawed from a legal perspective).

Wherefore, based on the foregoing, it is respectfully requested that Brite-Star's
Petition for Partial Reconsideration be denied.

Respectfully submitted,

Michael P. Stephens

By: 
Stephen C. Simpson
His Attorney

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(202) 408-7035

ATTACHMENT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 95-167
Table of Allotments,) RM-8699
FM Broadcast Stations.)
(Claremore and Chelsea, Oklahoma))

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 19, 1997

Released: March 28, 1997

By the Chief, Allocations Branch:

1. At the request of Michael P. Stephens ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 10 FCC Rcd 12073 (1995), proposing the reallocation of Channel 264A from Claremore to Chelsea, Oklahoma, as the community's first local aural transmission service, and the modification of petitioner's construction permit for Station KTFR to specify Chelsea as its community of license. Petitioner filed comments and reply comments reiterating its intention to apply for the channel.¹ No other timely comments were received.²

2. As stated in the Notice, petitioner indicated its intention to relocate its transmitter, thus creating gain and loss areas and populations if Channel 264A is reallocated to Chelsea. Therefore, he was requested to provide information showing the areas and populations which will receive new service and the areas and populations which will lose service, as well as the number of reception services currently available in the gain and loss areas. In response, he states that Station KTFR's 60 dBu contour at Claremore, with its authorized power of 3 kW at 100 meters HAAT, encompasses an area of 1,908 square kilometers with a population of 61,427 persons. As a Chelsea station, petitioner states that the station's 60 dBu contour will encompass an area of 2,554 square kilometers with a population of 39,731 persons. Thus, with the transmitter site change, there will be a gain area of 1,426 square kilometers containing 16,200 persons and a loss area of 780 square kilometers with 37,896 persons. Petitioner goes on to state that all of the loss

¹ The Notice requested that petitioner comply with Section 1.52 of the Commission's Rules by providing an affidavit verifying that the statements contained in the petitioner were accurate to the best of his knowledge. Petitioner, in his comments, has provided the requested verification.

² After the record closed, Brite-Star Broadcasting ("Brite-Star") filed a Motion for Leave to File Comments and Comments and petitioner filed an Opposition to Motion for Leave to File Comments and Comments. Brite-Star also filed in this proceeding a copy of its Informal Objection to the grant of petitioner's request to extend the construction deadline for Station KTFR (BMPH-960205JZ) and petitioner filed a copy of its Opposition to the Informal Objection. On February 20, 1997, the Audio Services Division, by delegated authority, granted a six-month extension of time to complete construction of Station KTFR. Therefore, the issue raised by Brite-Star, that is, whether the petitioner was the holder of a valid construction permit, is now moot and the pleadings will not be discussed.

area receives a minimum of nine and a maximum of twelve aural services while the population within the gain area receives a minimum of three to a maximum of thirteen services. He also reiterates that reallocating Channel 264A to Chelsea will allow Station KTFR to improve its facilities from 3 kW to 6 kW. Such operation is precluded as a Claremore station because of a short-spacing to Station KBBQ, Fort Smith, Arkansas.

3. We believe the public interest would be served by reallocating Channel 264A from Claremore to Chelsea, Oklahoma, as the community's first local aural transmission service. A staff engineering study shows that the reallocation of Channel 264A to Chelsea will result in a loss area of 659 square kilometers with a population of 15,724 persons, and a gain area of 1,303 square kilometers with a population of 17,437 people. While we are concerned with the loss of an existing service to almost 16,000 persons, this concern is lessened by the fact that the entire loss area will continue to be well-served, that is, receiving service from at least five full-time stations. Further, the reallocation of Channel 264A to Chelsea will provide a 1,327 people who will receive a fourth full-time reception service and 705 people who will receive a fifth such service.

Technical Summary

4. Channel 264A can be allotted to Chelsea in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.0 kilometers (1.2 miles) southwest, to avoid a short-spacing to Station KGLC, Channel 265A, Miami, Oklahoma.³

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective May 12, 1997, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Chelsea, Oklahoma	264A
Claremore, Oklahoma	--

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Michael P. Stephens for Station KTFR, Channel 264A, IS MODIFIED to specify Chelsea, Oklahoma, in lieu of Claremore, Oklahoma, as its community of license, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

³ The coordinates for Channel 264A at Chelsea are 36-31-27 North Latitude and 95-26-55 West Longitude.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Michael P. Stephens, permittee of Station KTFR, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

ATTACHMENT B

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554

In re Application of)
Michael P. Stephens) FCC File No. BMPH-960206JZ
For Extension of Construction Permit for)
KTFR (FM), Claremore, Oklahoma)

To: The Commission

Opposition to Application for Review

Michael P. Stephens ("Stephens"), by his attorney and pursuant to Section 1.115(d) of the Commission's rules and regulations, hereby respectfully submits his Opposition to the Application for Review filed by Brite-Star Broadcasting ("Brite-Star") on March 26, 1997. In support thereof, the following is shown:

A. Background¹

Michael P. Stephens is the permittee of KTFR (FM), Claremore, Oklahoma. Michael Stephens acquired the KTFR (FM) construction permit from Educational Broadcasting Corporation on February 9, 1995 (see FCC File No. BAPED-940405GF). By the express terms of the construction permit issued to Stephens, the expiration date of the KTFR (FM) construction permit was extended to February 9, 1996.

¹ Most of the "background" information delineated herein is also contained in Stephens' previously-filed "Opposition to Informal Objection" and is submitted herewith in order to simplify the review process. Official Notice of Stephens' previous filings in this matter is respectfully requested.

After grant of the subject assignment, Stephens began to actively proceed toward the completion of construction of KTFR (FM). Among other things, Stephens conducted engineering studies to determine the maximum public interest benefits which could be derived from the operation of KTFR (FM) and it was determined that a change in the authorized facilities would allow for, inter alia, a full 6,000 watt ERP and the removal of any interference from any existing broadcast station. In addition, Stephens contacted various community organizations and individuals in order to gauge their support for the proposed changes. Review of all of the positive factors convinced Stephens that the anticipated changes were in the public interest.

On July 6, 1995, Michael P. Stephens filed a Petition for Rulemaking seeking to move the Channel 264A allotment from Claremore to Chelsea, Oklahoma. The Petition for Rulemaking was filed well before the halfway point of the construction permit's required construction period. As demonstrated in the Petition for Rulemaking, Chelsea, Oklahoma has no AM, FM or TV stations licensed thereto (i.e., as opposed to Claremore which has an AM and an FM in addition to KTFR) and the proposed changes would result in a higher powered, interference-free facility. Finally, Stephens demonstrated that the proposed move was actually away from an Urbanized Area (i.e., Tulsa, Oklahoma), thus further demonstrating Stephen's good faith motives.

On November 2, 1995, the Federal Communications Commission issued a Notice of Proposed Rulemaking seeking comments on Stephens' proposal. On December 7, 1995, Stephens timely filed comments in support of the proposed allotment of Channel 264A to Chelsea, Oklahoma. Neither Brite-Star nor any other

party filed comments. On January 6, 1996, Stephens filed reply comments in support of the proposed allotment. Again, neither Brite-Star nor any other party filed reply comments.

Prior to the expiration of the KTFR (FM) construction permit on February 9, 1996, Stephens filed an FCC Form 307 application seeking extension of the KTFR (FM) construction permit. On July 11, 1996, Brite-Star filed a "Motion for Leave to File Comments and Comments" in the Chelsea, Oklahoma rulemaking proceeding (MM Docket 95-167; RM-8699), essentially seeking acceptance of its late-filed counterproposal to allot a new service to Chelsea, Oklahoma (and to open a filing window therefor). After receipt of Brite-Star's "Motion for Leave to File Comments and Comments", Stephens determined that the FCC's computer records did not reflect the existence of Stephen's FCC Form 307 application. On July 25, 1996, Stephens filed with the Commission a copy of his February, 1996 FCC Form 307 application and a copy of the canceled Fee Payment check (from Mellon Bank).

Stephens' FCC Form 307 application was accepted for filing per the FCC's Public Notice of August 2, 1996 (Report #23794). In response to an informal staff request, on August 20, 1996, Stephens submitted a minor supplement to his pending FCC Form 307 application to supply additional information regarding the efforts he had undertaken toward ultimate construction of KTFR (FM). On August 22, 1996, Stephens' FCC Form 307 application was granted by the FCC's staff.

Unfortunately, on that same day (August 22, 1996), Brite-Star (i.e., the group seeking to have its late-filed comments accepted in the Chelsea, Oklahoma rulemaking

and the Appellant herein), filed an "Informal Objection" to Stephens' FCC Form 307 application. Even though Brite-Star's pleading was not filed as a matter of right, undersigned Counsel was informed by the FCC's staff that Stephens' August 22, 1996 grant would not become effective until Stephens' FCC Form 307 application and Brite-Star's "Informal Objection" were referred to the legal division of the Audio Services Division for its review.

On February 20, 1997, the Federal Communications Commission granted Stephens' subject FCC Form 307 application (see Attachment A). On March 26, 1997, Brite-Star filed its subject Application for Review. On March 28, 1997, the Federal Communications Commission issued a Report and Order in MM Docket 95-167 (DA 97-582) authorizing, inter alia, the change in KTFR (FM)'s community of license from Claremore, Oklahoma to Chelsea, Oklahoma (see Attachment B). On April 4, 1997, Stephens filed an FCC Form 301 application (i.e., along with the requisite FCC Form 301 filing fee of \$690.00 and the rulemaking fee of \$1,905.00) seeking to implement the changes authorized in the Commission's March 28, 1997 Report and Order.

B. Standing

As an initial matter, Brite-Star lacks standing to file the instant Application for Review. As noted in its Application for Review, Brite-Star is "the sole proprietorship of George Ballew". Brite-Star concedes in Footnote 1 to its Application for Review that the only way that it can legally justify the filing of an Application for Review under the circumstances is to demonstrate that Brite-Star (i.e., George Ballew) is a "person

aggrieved". To that end, Brite-Star supplies the short Declaration of George Ballew which states in pertinent part:

I am a resident of Broken Arrow, Oklahoma, a community approximately 19 miles from Claremore, Oklahoma. Had Mr. Stephens constructed KTFR's facilities, I anticipate that I would have been able to receive the station's signal at my home. Furthermore, I typically travel three times a week to Claremore or its nearby vicinity. Thus, by failing to build the authorized facilities of KTFR, Mr. Stephens has denied an additional radio service to me and other listeners within the area to be served by KTFR.

Brite-Star submitted no objective evidence to demonstrate that (a) Broken Arrow is located within the formerly proposed coverage area of KTFR (FM) or (b) that Mr. Ballew would be unable to receive the signal of KTFR (FM) from the new transmitter site during his periodic drives though "Claremore or its nearby vicinity".

In fact, enclosed herewith as Attachment C is a copy of a U.S. Atlas map clearly showing that Broken Arrow is located southeast of Tulsa and south of "Muskogee Turnpike". Attachment D hereto consists of a coverage map for KTFR (FM)'s formerly proposed facilities at Claremore, Oklahoma which clearly demonstrates that the predicted coverage therefor falls well short of "Muskogee Turnpike". Thus, Mr. Ballew's "anticipation" that he would have been able to receive KTFR (FM) in Broken Arrow is simply self-serving speculation.

Mr. Ballew's other argument in favor of finessing "aggrieved person" status is that he would have been able to receive KTFR (FM)'s signal when he drove to "Claremore or its nearby vicinity". Putting aside the multitude of broadcast signals emanating from nearby Tulsa, Oklahoma which are available to Mr. Ballew during his drives through the Tulsa metropolitan area, the simple fact is that the signal of KTFR

(FM) from the new proposed transmitter site will continue to serve Claremore, Oklahoma, as well as the "nearby vicinity" (see Attachment E).

Finally, after arguing vigorously against the FCC allowing Stephens to move KTFR (FM) from Claremore to Chelsea, Mr. Ballew states in his Declaration that should Stephens' construction permit be canceled, he would be willing to build the station even if it was located in Chelsea.

Thus, by way of summary, Ballew believes that he (i.e., Brite-Star) is entitled to "aggrieved person" status because [a] Ballew lives well outside the predicted coverages of either KTFR (FM) proposal; [b] would have been able (i.e., from the former transmitter site) and will continue to be able (i.e., from the new proposed transmitter site) to receive KTFR (FM)'s signal in Claremore, Oklahoma during his periodic drives; and, [c] is willing to operate KTFR (FM) from either Claremore or Chelsea (but of course in place of Stephens).

Mr. Ballew is not an "aggrieved person", he is an opportunistic one. His motive is hardly the altruistic one put forth. Simply stated, Mr. Ballew wants Stephens to lose the construction permit in order that Brite-Star may apply therefor. Both from a procedural standpoint and, as will be demonstrated hereinbelow, from a factual one as well, Brite-Star's position is meritless.

C. Discussion

As a threshold matter, Brite-Star's Application for Review fails to satisfy the explicit mandate of Section 1.115(b)(1) of the Commission's rules and regulations, i.e.,

“that the application for review shall concisely and plainly state the questions presented for review” Specifically, Brite-Star states in its Application for Review that “the question presented is whether the staff erred in granting the above-captioned application for review under the circumstances [outlined in the Application for Review]”. While this may appear at first blush to represent an esoteric procedural argument by Stephens, the fact is that the vast majority of Brite-Star’s objections in its Application for Review are beyond the scope of the Audio Services Division’s February 20, 1997 letter (FCC Correspondence 1800B3-BCD; Attachment A hereto) granting the subject FCC Form 307 application of Michael P. Stephens. Succinctly stated, Brite-Star’s Application for Review focuses to a large degree upon the adequacy of a showing which the staff specifically ruled in its February 20, 1997 letter ruling was irrelevant given the specific facts presented (i.e., the so-called “one-in-three” showing embodied in 47 C.F.R Section 73.3534[b]). Again, while Stephens believes that grant of his above-referenced FCC Form 307 extension request would have been factually and legally justified under any “one-in-three” Section 73.3534[b] analysis, the simple fact is that such an issue is not before the Commission as a result of the February 20, 1997 letter ruling granting Stephen’s FCC Form 307 application.²

When all the posturing is stripped away from Brite-Star’s Application for Review, Brite-Star’s one central argument remains: The FCC’s policy of placing an assignee of a

² In fact, any such substantive “one-in-three” analysis would, consistent with Section 1.115 of the Commission’s rules, be appropriate only upon a remand of the proceeding after grant of the subject Application for Review.

construction permit in essentially the same position as the permittee of a new construction permit is bad public policy and represents an abuse of the Commission's discretion. Not surprisingly, Brite-Star cites no statute, regulation, case precedent or established Commission precedent which justifies this position. As will be discussed further hereinbelow, the draconian position advocated by Brite-Star would itself constitute bad public policy, would promote spectrum inefficiency and would be contrary to the express intent of Section 73.3534.

In its letter of February 20, 1997 granting the subject FCC Form 307 application, the Audio Services Division held in pertinent part as follows:

We disagree with BSB's assertion that Stephens has not satisfied the criteria of 47 C.F.R. Section 73.3534 to warrant an extension. Section 73.3535 of the Commission's rules allows a permittee who seeks to modify or assign its construction permit during the first half of an original construction period, to do so without making the "one-in-three" showing required by 47 C.F.R. Section 73.3534(b). The staff has interpreted this provision to also apply where an assignee seeks to modify a construction permit within the first half of the assignee's initial construction period. Therefore, an assignee who initiates a modification of its construction permit within the first six months of the post-consummation construction period is not required to make the "one-in-three" showing. This policy is designed to place an assignee in essentially the same position as the permittee of a new construction permit

Moreover, the staff has interpreted the Section 73.3535(a) exemption from the "one-in-three" showing to apply to a permittee, or assignee, who, within the first half of an original construction period, files a petition for rulemaking to modify the FM Table of Allotments. Because some proposed modifications of FM permits, such as changes of community of license, require a rulemaking by the Commission as a prerequisite to the filing of a modification application, this interpretation affords a permittee, or assignee, who proposes to modify its facility in a way that requires a rulemaking the same treatment as one who can modify its facilities simply through the direct filing of a modification application.

In this case, Stephens filed a petition for rulemaking on July 13, 1995, which was within the first half of his first construction period. When the subject

permit expired on February 9, 1996, the petition for rulemaking was still pending. It is established Commission precedent that the pendency of a petition for rulemaking is a circumstance beyond the applicant's control warranting an extension of a construction permit. See Letter to Lovcom, Inc. From Chief, Audio Services Division, Mass Media Bureau, October 12, 1993 (reference 1800B3-MAT) (applications for extension of construction permits premised on pendency of rulemaking petitions are routinely granted as a factor beyond the applicant's control).

The Commission's February 20, 1997 letter granting the subject FCC Form 307 extension represents a well-grounded delineation of **common sense**. Brite-Star explicitly concedes in its Application for Review that the filing and pendency of a rulemaking petition (i.e., as of the expiration date of a construction permit) represents good cause for granting an FCC Form 307 extension request but, apparently, **not if it involves the assignee of a construction permit**. Brite-Star fails to articulate how such a narrow interpretation is in the public interest. The fact is that it clearly is not. When the FCC grants a construction permit to an assignee, a new construction permit is issued bearing that permittee's name. In short, the post-assignment construction permit is the "original" construction permit for that permittee. If Brite-Star's "policy" of preventing any assignee of a construction permit from filing any FCC Form 301 modification or petition for rulemaking (e.g., due to changed circumstances or in order to utilize the spectrum in the most efficient manner)³ was adopted by the FCC, assignees would (for no logical reason) be legally treated unequally as compared with

³ Given the realistic and uncertain processing timelines with respect to rulemakings and modification applications, no assignee could afford such a risk: Such a filing would open itself up to attacks similar to those advanced by Brite-Star.

similar construction permit holders, the Commission would be subject to needless multiple filings (e.g., FCC Form 302-FM license applications for facilities which the permittee would propose to change after broadcasting sign-on), the Commission's goals of promoting spectrum efficiency would be undermined and needless costs would be incurred by both the Commission and the assignee.

D. Conclusion

Brite-Star lacks standing to file the subject Application for Review. Moreover, Brite-Star's burden under Section 1.115 of the Commission's rules is to demonstrate that the Commission's policy as articulated in the staff's February 20, 1997 letter ruling granting the subject FCC Form application should be overturned. It has failed to do so. The goal of Section 73.3534 is to ensure timely construction of broadcast stations and not to codify disincentives to good faith efforts to improve stations and promote spectrum efficiency. Plainly stated, what Brite-Star advocates is simply bad policy.

Wherefore, based on the foregoing, it is respectfully requested that Brite-Star's Application for Review be denied.

Respectfully submitted,

Michael P. Stephens

By: Stephen C. Simpson
Stephen C. Simpson

1090 Vermont Avenue, N.W.
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ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 20 1997

In reply refer to:
1800B3-BCD

Matthew H. McCormick, Esquire
Reddy, Begley & McCormick
1001 22nd Street, NW, Suite 350
Washington, DC 20037

Re: KTFR(FM), Claremore, OK
File No. BMPH-960205JZ
Application for Extension of
Construction Permit

Dear Mr. McCormick:

We have on file the above-referenced application (the "Application") of Michael Stephens ("Stephens") for an extension of time to construct unbuilt FM station KTFR(FM), Claremore, Oklahoma.¹ Also on file is the August 22, 1996 informal objection filed by Brite-Star Broadcasting ("BSB"), a Stephens opposition and a BSB reply. For the reasons set forth below, we deny the informal objection and grant the Application.

Background. The construction permit (File No. BPED-871216MB) for new noncommercial educational station KTFR(FM) to operate on channel 264A was issued to Educational Broadcasting Corporation ("EBC") on February 12, 1992. The construction permit, as modified, had an expiration date of August 3, 1995. On February 9, 1995, EBC consummated an assignment of the permit to Stephens, pursuant to authority granted in File No. BAPED-940405GF. By rule, the permit's authorized construction period was, upon consummation, extended to February 9, 1996. See 47 C.F.R. § 73.3535(c) (the time period allowed for construction is 12 months from the consummation of an assignment or the remainder of the construction period, whichever is longer). On July 13, 1995, a little more than five months after becoming the KTRF(FM) permittee, Stephens filed a petition for rulemaking (MM Docket No. 95-167) proposing to move the channel 264A allotment from Claremore to Chelsea, Oklahoma, and to modify the KTRF(FM) construction permit to specify Chelsea as its community of license.²

¹ On August 20, 1996, Stephens filed an amendment to the Application.

² This move would permit KTFR(FM) to operate with a full Class A effective radiated power of 6 kW.

On February 5, 1996, Stephens filed the Application (File No. BMPH-960205JZ) premised on the pendency of the rulemaking proceeding being a factor clearly beyond his control. In support of its informal objection, BSB states that Stephens has failed to satisfy any of the criteria of Section 73.3534(b) to warrant an extension of his permit. Specifically, BSB maintains that the pendency of Stephens' rulemaking petition does not justify an extension, and citing Michael C. Gelfand, M.D., 2 FCC Rcd 6522, 6523 (1987), asserts Stephens' decision to initiate the rulemaking was a private business decision and does not justify a permit extension. BSB further contends that Stephens did not abide by his certification to commence construction upon grant of the assignment application. In response, Stephens states that engineering studies determined that the changes proposed in the petition for rulemaking were "positive factors" in the public interest, and that he has expended "substantial time, effort and capital" trying to construct the KTFR(FM) facilities. Stephens also maintains that his rulemaking petition was properly filed in accordance with the provisions of 47 C.F.R. § 73.3535.³

Discussion. When contemplating applications for extension of construction permits, the Commission examines the record to determine whether the permittee's application satisfies one of the three factors set forth under 47 C.F.R. § 73.3534(b). That subsection provides, in pertinent part, that the Commission will grant an application for extension where a permittee can show that: (a) construction is complete and testing is underway; or (b) substantial progress has been made (i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion); or (c) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. See 47 C.F.R. § 73.3534(b). We have noted that "[i]mplicit in this requirement is the fact that a permittee's extension application will be judged according to the progress made during the most recent construction period." See Panavideo Broadcasting, Inc., 6 FCC Rcd 5259 (1991); see also Rainbow Broadcasting Company, 11 FCC Rcd 1167 (1995).

We disagree with BSB's assertion that Stephens has not satisfied the criteria of 47 C.F.R. § 73.3534 to warrant an extension. Section 73.3535 of the Commission's rules allows a permittee who seeks to modify or assign its construction permit during the first half of an original construction period, to do so without making the "one-in-three" showing required by

³ 47 C.F.R. § 73.3535(a) provides, in pertinent part, that:

If a permittee finds it necessary to file . . . an application to modify its authorized, but unbuilt facilities, . . . such application can be granted if filed within the first 9 months of the issuance of the original construction permit for radio . . . The permittee or assignee must certify that it will immediately begin building after the modification is granted.

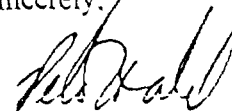
47 C.F.R. § 73.3534(b).⁴ The staff has interpreted this provision to also apply where an assignee seeks to modify a construction permit within the first half of the assignee's initial construction period. Therefore, an assignee who initiates a modification of its construction permit within the first six months of the post-consummation construction period is not required to make the "one-in-three" showing. This policy is designed to place an assignee in essentially the same position as the permittee of a new construction permit.

Moreover, the staff has interpreted the § 73.3535(a) exemption from the "one-in-three" showing to apply to a permittee, or assignee, who, within the first half of an original construction period, files a petition for rulemaking to modify the FM Table of Allotments. Because some proposed modifications of FM permits, such as changes of community of license, require a rulemaking by the Commission as a prerequisite to the filing of a modification application, this interpretation affords a permittee, or assignee, who proposes to modify its facility in a way that requires a rulemaking the same treatment as one who can modify its facilities simply through the direct filing of a modification application.

In this case, Stephens filed a petition for rulemaking on July 13, 1995, which was within the first half of his first construction period. When the subject permit expired on February 9, 1996, the petition for rulemaking was still pending.⁵ It is established Commission precedent that the pendency of a petition for rulemaking is a circumstance beyond the applicant's control warranting an extension of a construction permit. See Letter to Lovcom, Inc. from Chief, Audio Services Division, Mass Media Bureau, October 12, 1993 (reference 1800B3-MAT) (applications for extension of construction permits premised on pendency of rulemaking petitions are routinely granted as a factor beyond applicant's control).

Conclusion. The BSB informal objection IS DENIED and the KTFR(FM) application to extend its construction permit (File No. BMPH-960205JZ) IS GRANTED

Sincerely,



LB Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: Stephen C. Simpson, Esquire

⁴ See supra note 2.

⁵ The petition for rulemaking remains pending.

ATTACHMENT B